

On December 13, 2005, Judge Foerschler entered the Preliminary Decision in which the Judge found claimant's demand for payment was neither complete nor detailed as required by statute. The Judge also found claimant's average weekly wage had not been determined. Moreover, the Judge found the October 17, 2005, Preliminary Decision was pending appeal before this Board and, therefore, it was not prudent to levy a penalty that might be reversed in the near future. Accordingly, Judge Foerschler held the penalties

issue would be kept under advisement until the appeal of the October 17, 2005, Preliminary Decision was decided.

Claimant contends Judge Foerschler erred. Claimant asks the Board to determine claimant's average weekly wage; to find that claimant was entitled to receive \$467 per week in temporary total disability benefits; find that claimant's temporary total disability benefits should have commenced the date of the July 1, 2005, accident; and, finally, to assess penalties against respondent and its insurance carrier in the sum of \$2,251.87 for failing to comply with the October 17, 2005, Preliminary Decision.

Conversely, respondent and its insurance carrier contend this appeal should be dismissed as the Board lacks the jurisdiction at this juncture to determine a worker's average weekly wage. Moreover, respondent and its insurance carrier contend the December 13, 2005, Preliminary Decision should not be considered a final order or final determination of claimant's request for penalties as Judge Foerschler indicated he was taking that issue under advisement until the appeal of the October 17, 2005, Preliminary Decision had been decided. Accordingly, respondent and its insurance carrier request the Board to dismiss this appeal. In the alternative, they argue the Board should deny claimant's request for penalties as they have paid temporary total disability benefits commencing the date they believed claimant filed his application for hearing, and that they have paid temporary total disability benefits at the rate they believe is appropriate. Therefore, they request the Board to affirm the December 13, 2005, Preliminary Decision.

The only issues before the Board on this appeal are:

1. Is the December 13, 2005, Preliminary Decision a final order or final determination of claimant's request for penalties?
2. If so, did the Judge err in failing to assess penalties against respondent and its insurance carrier?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes this appeal should be dismissed.

On July 1, 2005, claimant fell from a tree and sustained serious injury. Following a preliminary hearing, Judge Foerschler issued a Preliminary Decision dated October 17, 2005, in which the Judge found the accident compensable under the Workers Compensation Act as respondent and its insurance carrier had failed to prove that claimant had willfully failed to use a safety device. The Judge ruled, in part:

Under these circumstances the ladder seemed to be the adequate safety appliance and the contention of violating safety requirements is not supported by the present evidence. The incident otherwise appears compensable and the medical expenses and the treatment by Mid-America Rehab Hospital should be provided, with temporary total disability calculated from his average weekly wage.¹

Respondent and its insurance carrier appealed that October 17, 2005, Preliminary Decision to this Board.

On October 18, 2005, claimant sent a demand letter to the attorney representing respondent and its insurance carrier. That letter demanded reimbursement of \$518.76 in medical expenses; the payment of temporary total disability benefits in the sum of \$467 per week commencing the date of accident, July 1, 2005; and the medical treatment recommended by Mid-America Rehabilitation Hospital.²

The parties appeared before Judge Foerschler on December 12, 2005, to address claimant's request for penalties. Following the hearing, the Judge entered the December 13, 2005, Preliminary Decision in which the Judge found claimant's demand was neither complete nor detailed and that the average weekly wage had not been determined. But, more importantly, the Judge held that he was taking claimant's request for penalties under advisement until he learned the outcome of the appeal of the October 17, 2005, Preliminary Decision. The December 13, 2005, Preliminary Decision reads, in pertinent part:

The demand for payment is not altogether complete or detailed as required. On the other hand respondent asserts adjustment and payment of the temporary total disability and of the expenses, except for some for which additional documentation has been requested. Also the actual weekly [wage] is still undetermined.

It does not appear either prudent or proper to be levying penalties or interest for alleged disregard of an order that may easily be reversed in a month or so, so this issue is kept under advisement until the appeal is decided by the Board.

The Board concludes the Judge took claimant's request for penalties under advisement. Accordingly, the Judge has not made a ruling that this Board can review. Consequently, this appeal is premature and, therefore, it should be dismissed.

¹ Preliminary Decision (Oct. 17, 2005).

² P.H. Trans. (Dec. 12, 2005), Cl. Ex. 1.

Should this matter return to the Board concerning claimant's request for penalties premised upon the October 18, 2005, demand for compensation, the parties should address the automatic stay provisions of the Workers Compensation Act as they would apply to the appeal of the October 17, 2005, Preliminary Decision.

WHEREFORE, the Board dismisses claimant's appeal.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Samantha N. Benjamin, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director